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THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2019-000011 11/08/2019

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
D. Tapia
Deputy

STATE OF ARIZONA, et al.

BRUNN W ROYSDEN III

v.

ARIZONA BOARD OF REGENTS, et al.

BRETT W JOHNSON

JOSEPH S KIEFER
SHANE R SWINDLE

MINUTE ENTRY

The Court has "Plaintiff's Motion for Summary Judgment on Arizona Board of Regents ("ABOR") Sixth Affirmative Defense," filed September 16, 2019, ABOR's response, filed October 1, 2019 and Plaintiff's reply, filed October 11, 2019.

The Court also has "Defendant ABOR's Motion for Summary Judgment re: Count IV," filed September 16, 2019, Plaintiff's response, filed October 1, 2019 and Defendant's reply, filed October 11, 2019.

The Court benefited from oral argument on both motions on October 25, 2019.

Relation Back Under Rule 15(c)

The Plaintiff argues that Count Four, the Gift Clause claim, which was first alleged in the First Amended Complaint, ought to relate back to the time that Plaintiff's tax claims were made in the original Complaint: January 10, 2019.

Relation back is a concept that is construed broadly in Arizona. It is found to exist unless "the amendment seeks relief with respect to a transaction or event which was not the basis of the original complaint." *Marshall v. Superior Court*, 131 Ariz. 379, 383 (1982).

This concept is codified in Rule 15(c) of the Rules of Civil Procedure, which provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

The United States Supreme Court has commented that the identical Federal Rule of Civil Procedure 15(c) is an effort to:

> balance the interests of the defendant protected by the statute of limitations with the preference ... for resolving disputes on their merits. … A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose. But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity.

Krupski v. Costa Crociere S.p.A., 560 U.S. 538, 550 (2010) (citations omitted).

Like *Krupski*, most of the case law on the topic of the relation back doctrine focuses on adding a new party by amendment, not adding a new claim. There are, however, two Arizona cases which are instructive on applying the doctrine to attempts to add new claim by amendment, although neither include much analysis of the issue.

In *Barnes v. Vozack*, 113 Ariz. 269 (1976), the appellant asked the court to find that its claims for (1) fraud in the sale of the stock pursuant to A.R.S. § 44—1991, and (2) violation of A.R.S. § 44—1992 by making a false statement in a Petition to Exempt the Sale of Certain Stock, both related back to the date it filed its original common law fraud claim.

The Supreme Court found that the common law fraud claim and the claim for fraud in the sale of the stock pursuant to A.R.S. § 44—1991 were based upon the conduct, transaction and occurrence. It held that the claim of making a false statement in an exemption application, however, "is not a part of the same 'conduct, transaction or occurrence' which was the basis of the original complaint for fraud in the sale of the stock. This portion of the complaint did not relate back and the trial court should have stricken that portion of the amended complaint as being covered by the statute of limitations." *Id*. at 272.

Similarly, in *Boatman v. Samaritan Health Services*, 168 Ariz. 207 (App. 1990), the court found that the plaintiff's defamation claims did not relate back to the original claim of intentional interference with contract. The two claims did not arise out of the same conduct, transaction, or occurrence.

The claims is *Barnes v. Vozack* (common law fraud and making a false statement in an exemption application) and the claims in *Boatman* (intentional interference with contract and defamation) arose from the same conduct, transaction or occurrence as one another moreso than the tax claims and the Gift Clause claims do in the present case. The only link between the two claims in the present case is that they both deal with the agreements between the Defendant and Omni. They are otherwise completely separate claims.

The Plaintiff's original grievance against the Omni Deal was that it amounted to an effective transfer of ownership from public to private, and therefore the Board and the City of Tempe were liable for property tax on the land notwithstanding A.R.S. Const. Art. IX § 2(1). The Court, following case law going back to *Maricopa County v. Fox Riverside Theatre Corp*., 57 Ariz. 407, 413 (1941), held that alienation of a leasehold interest does not override the public fee owner's exempt status.

The Gift Clause claim addresses an entirely different question. The "gift" element is not the indirect exploitation by Omni of the Board's and City's tax-exempt status, but its direct receipt of revenues that should belong to the Board and the City.

ACCORDINGLY, the Gift Clause claim does not relate back to January 10, 2019.

Statute of Limitations

As previously noted by the Court, the applicable statute of limitations for bringing a Gift Clause claim is one year from the date the cause of action accrues. A.R.S. § 12-821. Once the Attorney General possessed a minimum requisite of knowledge sufficient to identify that a wrong had occurred and caused injury, even if he did not know all of the details of the claim or his injury, the Gift Clause Claim accrued. *Cruz v. City of Tucson*, 243 Ariz. 69 (App. 2017) and *Walk v. Ring*, 202 Ariz. 310, 316, ¶ 22 (2002).

When the Attorney General knew enough about the Omni Deal to recognize that it might violate the Gift Clause, then the duty to investigate the claim was triggered and the statute of limitations clock began to run. If that date was before April 3, 2018, then the claim was filed too late and must be dismissed.

With that in mind, the Court reviews the uncontested evidence:

In January 2018, attorneys within the Attorney General's Office circulated and discussed a December 2017 report from the Arizona Tax Research Association which criticized the Defendant for leasing its property to private entities and opined that such transactions were "dubious" under the Gift Clause.

In that same month, the Plaintiff came to the conclusion that a deal similar to the Omni Deal – the Marina Heights Deal - violated the Gift Clause because the ABOR agreed to rent its tax-exempt property in exchange for *in lieu* rent payments.

On January 11, 2018 Representative Athena Salman wrote an op-ed article about the Omni Deal in the ARIZONA REPUBLIC entitled *ASU's Omni Hotel Is the Worst Tax Break You've Never Heard of.* Rep. Salman's letter began, "The Tempe City Council is set on Jan. 11 to give away up to $21 million in tax breaks to Omni Hotels in a deal practically no one has heard about." The letter continued, "You would think that the [Tempe City] council would hesitate, given that the state Attorney General is already investigating Tempe's latest tax giveaways," a reference to the ABOR/Marina Heights Deal.[1]

The article was circulated within the Attorney General's office. After receiving this article, one of the attorneys in this case, Mr. Daniels, commented to others within the Attorney General's Office that "[a] 'payment in lieu of tax' sounds pretty suspicious."

Just three days before the newspaper article was published, another Deputy Attorney General in this case, Mr. Roysden, asked for and received from Mr. Daniels a legal memorandum to help "look into a gift clause violation related to ASU's commercial development in Tempe."

There are certainly details about the Omni Deal which the Attorney General did not actually know until after April 3, 2018 (the exact number of days that ASU would have free use of the facilities, etc.). The statute of limitations, however, does not accrue when all the details of a claim become known to a Plaintiff. It accrues when enough details of the deal were known, or should have been, that the Plaintiff could identify that a wrong had occurred and caused injury.

The facts that the Omni Deal included payment of rent *in lieu* of taxes and the payment of approximately $20 million in public monies to fund construction of the conference center were

[1] On the same day, the Tempe local edition (and possibly others) of the REPUBLIC ran a news story by reporter Jerod MacDonald-Evoy, "Tempe Approves $21 Million Tax Break for Hotel and Conference Center." Reciting the same facts as Rep. Salman's letter, it added the detail that the project did not rest entirely on municipal land; it included land owned by ASU, i.e, the Board of Regents. Defendant does not assert that this article was circulated along with Rep. Salman's among the AG's staff, so this evidence goes only to whether Plaintiff should have known, not whether it had actual knowledge.

actually known to the Plaintiff for more than a year before it filed its Gift Clause Claim. Not only did it have enough information to trigger a duty to investigate, the Plaintiff actually was investigating a Gift Clause claim involving the ABOR/Omni Deal more than a year before it filed the instant claim.

ACCORDINGLY, the Plaintiff's Gift Clause claim is barred by the applicable statue of limitations.

Conclusion

ACCORDINGLY, Plaintiff's Motion for Summary Judgment on Arizona Board of Regents ("ABOR") Sixth Affirmative Defense is **denied**, and Defendant ABOR's Motion for Summary Judgment re: Count IV is **granted**.